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9 IN THE UNITED STATES DISTRICT COURT

10 DISTRICT OF ALASKA

11

12 Sally C. Purser, )  
13 Plaintiff, ) MEMORANDUM OF POINTS AND  
14 v. ) AUTHORITIES ON MOTION FOR  
15 Josef F. Boehm, Allen K. ) RECONSIDERATION RE: SUMMARY  
16 Bolling, and Bambi Tyree, ) JUDGMENT  
17 Defendants. )  
18 ) CASE NO.: A05-0085 (JKS)  
19 \_\_\_\_\_)

19 MEMORANDUM OF POINTS AND AUTHORITIES

20 I. Introduction

21 Defendant Boehm requests that the court reconsider its order  
22 granting summary judgment on the issue of liability. Boehm has  
23 been acting under good faith and has tried diligently to provide  
24 the court with all necessary evidence to contest the claims of  
25 Plaintiff Purser.

26 On March 23, 2003, this court granted summary judgment  
27 regarding liability. The court reasoned that Purser had provided a

1 sworn statement which stated, "In exchange for the crack cocaine  
 2 that Mr. Boehm provided to me, he demanded that I perform sexual  
 3 acts on him, his male companions, as well as on other young girls  
 4 and woman [sic] for his self gratification." *Order Granting*  
 5 *Summary Judgment, page 4.*

6 The court held that these claims were not contested because  
 7 "Boehm has not filed an affidavit or submitted a deposition in  
 8 which he denies under oath that Sally Purser performed sexual acts  
 9 at his request in return for crack cocaine." *Id.* at 5. However,  
 10 the exact affidavit the court states is lacking was filed by  
 11 counsel in a supplemental brief.

12 Plaintiff Purser intentionally omitted affidavits, relied on  
 13 by this court, in her summary judgment motion. As a result,  
 14 Boehm's counsel was significantly hindered in obtaining a signed  
 15 affidavit from Boehm denying the claims in Purser's affidavits.  
 16

17 Defendant Boehm respectfully requests that the court  
 18 reconsider its decision of March 23, 2003, and deny summary  
 19 judgment on the issue of liability.

20 **II. Argument**

21 **A. Authority for motion for reconsideration.**

22 FRCP rule 59(e) provides that any motion to alter or amend a  
 23 judgment shall be filed no later than ten days after entry of the  
 24 judgment. Reconsideration of an order on a motion for summary  
 25 judgment is appropriate when (1) the court is presented with newly  
 26 discovered evidence; (2) the court committed clear error; (3) there  
 27 is an intervening change in controlling law; or (4) **other highly**

1       **unusual circumstances exist.** (emphasis mine). *Nail v. Brazoria*  
2       *County Drainage Dist*, 992 F.Supp. 921, 925 (S.D. Tex. 1998).

3           **B. Plaintiff's deliberate withholding of affidavits severely**  
4           **prejudiced Defendant Boehm. Because of Boehm's incarceration,**  
5           **he was unable to properly respond creating a highly unusual**  
6           **circumstance in which Boehm was denied his right to properly**  
7           **deny Purser's claims.**

8       Plaintiff filed her Second Motion for Summary Judgment on  
9 December 14, 2006. The Motion was filed without the attached  
10 affidavits of Plaintiff and former defendant Bambi Tyree. Due to  
11 her desire to have the affidavits filed under seal, Plaintiff  
12 Purser omitted the affidavits. The affidavits were the sole  
13 support for her Motion. Even without the inclusion of the  
14 affidavits, the statutory period continued to run to the detriment  
15 of Boehm.

16       Affidavits supporting summary judgment were not received by  
17 Defense counsel until December 22, 2006 (*eight days after filing*).  
18 Thus, denying defense counsel the opportunity to respond with a  
19 signed affidavit from Boehm.

20       Plaintiff's counsel is well aware of the obstacles associated  
21 with preparing paperwork and having it viewed by Boehm while  
22 incarcerated. Mr. Boehm is incarcerated approximately 150 miles  
23 away from defense counsel's office. In order for counsel to meet  
24 with Mr. Boehm, they must spend upwards of five hours in driving  
25 time and an hour of processing time to see Mr. Boehm for a few  
26 hours per visit. Further, visiting hours are limited to two days  
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1 per week. This court has recognized these challenges in its  
2 scheduling and planning order.

3 With this knowledge, Plaintiff's counsel intentionally filed  
4 his motion for summary judgment while Defense counsel was in  
5 Anchorage Alaska performing needed depositions. Defendant Boehm  
6 was further prejudiced because the statutory response period  
7 encompassed the Christmas and New Years Holidays making visits  
8 extremely difficult.

9 The actions of Purser's counsel are, at best, questionable  
10 and do not comport with notions of fair play.

11 **C. Defendant Boehm signed an affidavit denying all claims  
12 made by Plaintiff Purser and Bambi Tyree.**

13 Boehm has created genuine disputes of material facts through  
14 his signed January 15, 2006 affidavit. In this affidavit, Boehm  
15 denied all claims made by Plaintiff Purser and Bambi Tyree.  
16 Boehm's affidavit is attached and marked Exhibit A. This affidavit  
17 was included in a supplemental motion to Boehm's Opposition to  
18 Summary Judgment. Docket No. 152. This supplemental motion was  
19 denied because the court ruled that this evidence was available at  
20 the time of the filing of the first motion in opposition to summary  
21 judgment. Although the affidavit was technically available, it was  
22 constructively impossible to obtain through due diligence of  
23 Defense Counsel because of Plaintiff Counsel's actions mentioned  
24 above.

25 Boehm's January 15, 2006 affidavit should be considered by  
26 this court.

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1           **D. Boehm denied all claims made by Plaintiff Purser in his  
2 discovery responses.**

3           Boehm has created genuine disputes of material facts through  
4 his responses to discovery requests. Although this court has ruled  
5 that mere denials under oath in conclusory terms of requests for  
6 admission is not equivalent of an affidavit, Boehm should be  
7 allowed in this situation to rely on the denials in the discovery  
8 requests.

9           Defendant Boehm was not allowed the full amount of time to  
10 respond to Plaintiff Purser's accusations because of the willful,  
11 deliberate, and questionable actions of Purser's attorney. Thus,  
12 an unusual circumstance exists where Boehm should be allowed to  
13 rely on his responses to Purser's discovery requests to create  
14 genuine disputes of material facts.

15

16 **III. Conclusion**

17           Plaintiff Purser should not be allowed to withhold  
18 affidavits, knowing that it will severely prejudice Defendant  
19 Boehm, and then submit them at the eleventh hour. For the  
20 aforementioned reasons, Defendant Boehm respectfully requests this  
21 court reconsider its March 23, 2007 ruling and deny summary  
22 judgment.

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1 DATED this 4th day of April, 2007 at Encino, California.  
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**MEMORANDUM OF POINTS AND AUTHORITIES ON MOTION TO RECONSIDER RE:  
SUMMARY JUDGMENT**